CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF MEETING, Public Session

January 20, 2005

Call to order: Chairwoman Liane Randolph called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:49 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairwoman Randolph, Commissioners Sheridan Downey, Pam Karlan, and Tom Knox were present. Commissioner Philip Blair was absent.

Item #1. Public Comment.

None.

Consent Calendar

Commissioner Karlan moved approval of the following items:

Item #2. Approval of the August 5, 2004, Commission Meeting Minutes.

Item #3. Approval of the December 9, 2004, Commission Meeting Minutes.

Item #4. In the Matter of Jeff Palmisano, FPPC No. 02/620. (3 counts).

Item #5. In the Matter of David Boul, FPPC No. 99/438. (1 count).

Item #6. In the Matter of Henry M. Duque, FPPC No. 00/593. (9 counts).

Item #7. In the Matter of Kenneth Wallace, FPPC No. 01/093. (2 counts).

Item #8. In the Matter of K. Hovnanian Forecast Homes, FPPC No. 03/792. (2 counts).

Item #9. In the Matter of Harold B. Williams, FPPC No. 03/832. (1 count).

Item #10. In the Matter of Andrew Ludwick, FPPC No. 03/278. (2 counts).

Item #11. In the Matter of Citizens For Traffic Relief and Frank Mooney, FPPC No. 00/687. (1 count).

Item #12. In the Matter of Tom Ammiano, Tom Ammiano for Mayor, and Esther Marks, FPPC No. 01/408. (1 count).

Item #13. In the Matter of Antonio Cardenas, Tony Cardenas 2000, Maria Sanchez, and Kinde Durkee, FPPC No. 01/645. (11 counts).

Item #14. In the Matter of Guadalupe Arellano, Arellano for Mayor, and Luis Ramirez, FPPC No. 02/051. (1 count).

Item #15. In the Matter of Tahnya Ballard, Ratepayers for Tahnya Ballard and Patricia Austin, FPPC No. 01/156. (2 counts).

Item #16. In the Matter of Juan Vargas, Vargas 2000, and Deanna Liebergot, FPPC No. 01/699. (1 count).

Item #17. Failure to Timely File Statements of Economic Interests.

a. In the Matter of Thomas Soto, FPPC No. 04/637. (1 count).

b. In the Matter of Glenn Parker, FPPC No. 04/691. (1 count).

Item #18. Failure to Timely Disclose Late Contributions – Proactive Program.

a. In the Matter of Solectron Corporation, FPPC No. 04-0715. (1 count).

b. In the Matter of Donaghy Sales, LLC, FPPC No. 04-0716. (1 count).

c. In the Matter of American Specialty Health Plans, FPPC No. 04-765. (l count).

d. In the Matter of Norman Lear, FPPC No. 04-769. (2 counts).

e. In the Matter of Dennis O'Brien and The O'Brien Group, FPPC No. 04-775. (1 count).

f. In the Matter of Shapell Industries, Nathan Shapell & Affiliated Entities, FPPC No. 04-777. (1 count).

g. In the Matter of Lusardi Construction Company, FPPC No. 04-778. (1 count).

h. In the Matter of Mark Christopher Auto Center, Mountain View Chevrolet, CSM&C Expansion, FPPC No. 04-779. (1 count).

i. In the Matter of Farmers Group, Inc. and Affiliated Entities, FPPC No. 04-673. (12 counts).

Item #19. Failure to Timely File Major Donor Statements – Proactive Program.

a. In the Matter of Sawhill Consulting, FPPC No. 04-802. (1 count).

b. **In the Matter of People For The American Way, FPPC No. 04-798.** (2 counts).

c. **In the Matter of Association of American Medical Colleges, FPPC No. 04-800.** (1 count).

d. **In the Matter of Brett Messing, FPPC No. 04-0804.** (1 count).

e. **In the Matter of B. L. Schwartz, FPPC No. 04-794.** (1 count).

f. **In the Matter of Syntex USA LLC, FPPC No. 04-0797.** (1 count).

g. **In the Matter of Advanced Diagnostic And Surgical Center, Inc., FPPC No. 04-0807.** (1 count).

h. **In the Matter of Herbert M. Gelfand, FPPC No. 04-0793.** (1 count).

Commissioner Downey seconded the motion.

Commissioners Downey, Karlan, Knox, and Chairwoman Randolph voted, "Aye." The motion carried by a 4-0 vote.

Item Removed From Consent

There were none.

Item #20. St. Croix In re St. Croix Opinion Request (O-04-226).

Commission Counsel Galena West explained that she received two comment letters on the St. Croix opinion. One letter was from John St. Croix, the requestor, who endorsed the staff recommendations and encouraged the commission to issue an opinion. The second letter was from June Genis, who endorsed the recommendation that people be allowed to send mailers in the spirit of ranked-choice voting and said that this voting rule helps to avoid negative campaigning.

Ms. West began her Power Point presentation to explain the ranked-choice voting system. She used four candidates in an example ballot situation. First, the voter would pick her first choice, Sally Jones, and then rank the remaining candidates in order of preference, for example, John Smith second, then Mike Myers third. If the voter only voted for one candidate, then the vote would count only once; thus, if that one candidate did not win after the first round of voting, then the voter's vote would be eliminated. In scenario one, Jane Doe wins, so the hypothetical voter's vote was counted for Sally Jones but was never counted for John Smith or Mike Myers because the tallying only took one round to determine a majority. Thus, the second and third choices were never counted, just as they are in a standard election. In scenario two, no candidate receives a majority, so ranked-choice voting would be used. The first choice votes in this case would be tallied, but Sally Jones, in the hypothetical, received the lowest number of votes. With

Sally Jones out of the running, the system would tally the second choice votes of all who voted for her first. The hypothetical voter's second-choice was John Smith, and the vote would then be counted for him. Thus, with all of Sally Jones' second-choice votes distributed, the counting stops if anyone obtains a majority. If no majority was determined at that point, then the voter's third choice would be distributed. Ms. West commented that the system is complicated for people to understand at which level their vote will count.

Ms. West identified the issues for discussion as whether to issue an opinion regarding ranked-choice voting, whether one candidate can send a mailing about another candidate by suggesting a ranking order, and whether multiple candidates could collaborate on one mailing piece and if so, how that cost would be divided. Staff recommends that the commission adopt an opinion to issue advice on ranked-choice voting, specifically regarding section 85501 of the Political Reform Act (PRA) to give the candidate guidance. Staff recommends that the Commission permit the mailings, whether mailed individually or in collaboration with other candidates, and staff recommends the basic method of calculation for non-monetary contributions.

Commissioner Knox asked what happens if the Commission concludes that the statute does not give the Commission the latitude to allow a candidate to send out a mailer that asks for someone's vote in addition to suggesting another candidate as the voter's second choice. He hypothesized that the effect would be that the candidate could not send out such mailers.

Ms. West agreed, saying that if the Commission finds that 85501 applies because of the literal wording in the statute, that would preclude any mailer by one candidate that endorsed another candidate.

Commissioner Knox added that the candidate sending the mailer could list the second and third choice candidates if he or she talked to those candidates.

Ms. West responded, explaining that those actions would take it out of the independent expenditure part of the statute. The candidate would also be required to ensure that it was not a contribution to the other candidates.

Chairwoman Randolph opined that if the Commission were to interpret 85501 completely literally, it says that the controlled committee of a candidate may not make independent expenditures for the purpose of opposing other candidates. The Commission has never interpreted that to mean that a candidate could not send out a mailer, independent of his opponent, in opposition to the opponent's campaign.

Ms. West responded that the Chairwoman was correct. All of the FPPC interpretations, including supporting another candidate, have included supporting other candidates running for a different office.

Commissioner Downey opined that it is important for the Commission to issue an opinion because if the Commission said it is okay for a candidate to list suggested second and third choice candidates, then San Francisco could say, under its own provisions mirroring section 85501, that they interpret the language differently. On the other hand, if the Commission says

that section 85501 has no flexibility and that a candidate cannot suggest second and third-choice candidates, then San Francisco would not be able to interpret its provisions to the contrary.

Commissioner Karlan discussed the broader implications of this issue. If other places in California adopt RCV (ranked-choice voting), and they adopt it for multi-member offices – as opposed to San Francisco, which, as of now, declares one winner only for each office – then the Commission should be careful in drafting the opinion letter so that it acknowledges that there are two kinds of elections in which the RCV can operate. The first is single-member offices, and the second is through mutli-member bodies such as city council members elected at large in some parts of California. So, the Commission should be careful with multi-member offices where there may be two candidates for election into two seats of the same office. For multi-member offices, each candidate must get at least a quota number in the first round. If there are still seats open, the system drops the bottom candidate and redistributes those voters' second-choice votes up to the other candidates. Then, if the top person is elected, the system takes the overage and redistributes them downward to those voters' second-choice candidates. So, the redistribution continues up and down the scale until all the seats are filled. Although it is complicated to count, it is transparent to the voters.

Chairwoman Randolph said that it seemed like the purpose of section 85501 was to avoid the "kingmaker" scenario where a person is pumping a lot of money into different races. It does not seem that the section was meant to cover a person's own race. Where a candidate was linking himself with the Governor, for example, or disparaging other candidates, or advising voters how to rank opponents as a strategy to further ones own candidacy, it seems that section 85501 does not apply. She wondered how great the concern is in a situation with multi-candidate offices.

Commissioner Karlan opined that the "kingmaker" scenario could arise in that situation. If one candidate knows he will be the most popular candidate for the 5-member city council and he advises voters to vote for a particular candidate to fill the second and third slots, for example, then there would be a "kingmaker" problem. In multi-member office races, candidates often try to do this because that is how one builds coalitions. In the situation before us, the race is for a single winner and not for multiple winners. The concern is if this system spreads to multi-member offices.

Commissioner Downey commented that this scenario occurs in county central committees, where most people do not even know who is running for a seat on the Republican, Democratic, Freedom, or Green party central committee. Often there will be one powerful candidate who really wants to "pack" that committee, and that person has no problem getting elected. Instead, the candidate spends his or her time promoting "cronies." He asked what concerns there are under the forthcoming opinion letter that might impact this situation.

Ms. West explained that the basis for the analysis is that the candidates should be promoting their own candidacy, so in the central committee scenario, that person would not be promoting his or her own candidacy by only promoting another candidate. There would likely be a violation in that situation under this recommendation, but that would be difficult to prove.

Commissioner Karlan said it would be impossible to prove, because the ad would say, "vote for me and also vote for my friend…" It would be impossible to prove that the ad was not just an attempt to get the other person elected.

Chairwoman Randolph suggested that one option would be to keep the facts of the opinion limited to ranked-choice voting where a candidate is running for a single-member office in which only one winner is to be declared.

Ms. West agreed with that option and commented that the opinion is based on the St. Croix facts in the San Francisco situation. In this situation, the multi-member office scenario does not apply, as San Francisco has a districted board of supervisors. The only concern might be where a candidate may say to vote for a second person because he or she thinks the third person is their biggest competition.

Commissioner Karlan advised that that situation is still an attempt by the candidate to get himself elected, not to take part in the before-mentioned "kingmaking" or "slate-packing" scenario.

Commissioner Downey added that after reading the draft opinion of the City, this seemed to make a lot of sense as it focused on the "primary purpose rule." The staff memo encompassed that notion under "campaign strategy," so that if the candidate's real strategy is to get themselves elected, then section 85501 should not be an obstacle. He said that the opinion letter should come out that way. He asked if there was any problem with the rationale of the San Francisco draft opinion.

Ms. West responded that the San Francisco opinion ignored the concept of independent expenditures so that it was not explained at all. This could be discussed in the Commission's opinion.

Chairwoman Randolph explained that the process for this opinion is that the opinion would be brought back at the March Commission meeting upon direction by the Commission.

Commissioner Knox objected to directing staff to bring back the opinion. He said it was a reasonable solution to allow candidates to do this under a ranked-voting system, but he thought it was a matter for the Legislature, not the Commission. The statute on its face appears to prohibit the Commission from doing this. He was also concerned about the scenario identified in the San Francisco Ethics Commission letter, which says that the Commission recognizes that under a different factual situation, the primary purpose of an expenditure by a candidate to urge voters to rank another candidate second or third might be to urge voters to elect the other candidate after he or she decides to withdraw from the race. This would not be done for the primary purpose of electing the candidate who is sending the mailer, but rather to elect another candidate as a way of circumventing campaign contribution limitations. He suggested that this requires a statutory change and that he does not favor an interpretation by the Commission that does such violence to the statute in light of plain language to the contrary.

Commissioner Downey asked Commissioner Knox if his position was based on section 85501, which reads, "a candidate may not make independent expenditures… to support other

candidates." He asked if this is what makes it clear to Commissioner Knox that a candidate could not suggest a second-choice candidate.

Commissioner Knox explained that section 82031 defines an independent expenditure without reference to the candidate's purpose. It only says that an independent expenditure is a communication which expressly advocates the election or defeat of a clearly identified candidate. He opined that the Commission does not have the "wiggle room" to offer the opinion.

Chairwoman Randolph expressed that the specific seems to control over the general. The general rule is that "purpose" is not part of the independent expenditure definition, but the ban in section 85501 discusses the purpose of supporting or opposing a candidate.

Commissioner Knox reiterated that he looks at the plain language. If he listed Mr. Myers as his second choice, he is to that extent urging Mr. Myers' election.

Chairwoman Randolph asked whether that was also true of candidates who are making expenditures in opposition of their opponent.

Commissioner Knox opined that that would be such a ridiculous interpretation of the statute that the Legislature or the people who approved this cannot have meant that a candidate could not send out an opposing mailer on his opponent.

Commissioner Karlan pointed out that where the statute says, "expenditures to support or oppose other candidates," the question is whether "other candidates" means "candidates for other offices." Not being permitted to oppose a candidate for one's own office in a single member race would be an absurd interpretation of the statute. Thus, the assumption is that one has to oppose the other candidate in your own race or else one would not get elected. The question is, if this is all for one office, should this be read as not involving other candidates?

Commissioner Knox responded that the statute has to be read so that one can write opposition pieces about one's opposition, but it seems the statute was designed to keep candidates from supporting other candidates through independent expenditures.

Commissioner Karlan asked what Commissioner Knox would say about an independent expenditure within the meaning of section 85501 that allows a candidate to state that she thinks that her opponent is an honorable man who would do a fine job if elected, but that she thinks she would do a better job. Commissioner Karlan presumed that would be a perfectly permissible statement because, while this statement would support the opponent, it still says that the candidate wants to be the winner.

Commissioner Knox said the bottom line is that the candidate wants to win.

Commissioner Karlan continued, asking Commissioner Knox why he thought that saying "vote for me first, but him second" or "better you should come out and vote for him than stay at home" is not permissible, even though it expresses support for the opponent.

Commissioner Knox said that would be a permissible statement.

Commissioner Karlan asked why the same statement in a ranked-choice voting system would not be permissible.

Commissioner Knox stated that Commissioner Karlan's questions are good and that he would need to think about the answer before the next meeting.

Commissioner Downey added that the Commissioners have until March to think about the issue.

Chairwoman Randolph suggested that the Commission direct staff to draft an opinion because there are at least three Commissioners who would like to see a draft. She directed staff to draft the opinion based on option one.

Item #21. Discussion of Eliminating Paper Copies of Quarterly Lobbying Disclosure Reports; Prenotice Discussion of New Regulation 18465.1.

Senior Commission Counsel Scott Tocher explained that the issue of elimination of paper filings is a natural progression as the online system came on board. The Online Disclosure Act of 1997 required the Secretary of State's office to create a system for online filers, for both campaign reports and lobbying and other activities. The Secretary of State is charged with determining whether the system operates effectively and is required to consult with the Commission in making that determination. Upon that determination, the respective paper filings may be eliminated. Last year, the Secretary of State's office notified the Commission that it was prepared to move forward with elimination of paper filings in the limited area of lobbying activity reports. To that end, staff from the Secretary of State's office and the Commission met last year to discuss the status of the lobbying activity reports. In November 2004, the Commission held an interested persons meeting which was well attended by press, filers, vendors, and others involved in the process. The consensus was that the system was operating effectively. Staff met again in December to review their findings and agreed that the system was operating effectively, with one exception that was mentioned in the memorandum. Since that time, further developments in the online system have alleviated the concerns regarding one of those forms.

Mr. Tocher identified three recommendations from staff. First, the Commission should adopt a regulation that clarifies the verification responsibilities of a filer since the signed paper copy would be eliminated. Section 84605 presumes that any filing made online is under penalty of perjury, but the system allows a third party, or vendor, to file reports on behalf of the filer. It would be helpful to have a regulation that clarifies that the use of a third party vendor does not eliminate that presumption that the filing is filed under penalty of perjury. Staff drafted this proposed regulation for pre-notice discussion. Mr. Tocher received communication from John Keplinger, the acting chief of the Political Reform Division, who indicated that the Secretary of State's office supports the proposed regulation. Second, the online system allows a filer, upon acquisition of a log-in password, to designate a vendor who is also authorized to file on their behalf. Therefore, the Commission should recommend to the Secretary of State's office to

amend the vendor designation form to notify filers of the aforementioned regulation. Third, staff initially recommended that Form 615, filed by individual lobbyists, should not be eliminated because the form could not be obtained in a method similar to the other reports. Since the preparation of the staff memorandum, the Secretary of State's office has brought the form online in the same way as the other forms. Mr. Tocher thanked David Hulse, from the Secretary of State's office, who brought a document that explains how the system works. Now, one can click on an individual lobbyist and conduct searches for their financial activity and see the information from the Form 615. Mr. Tocher said that it appears that the entire reporting scheme for lobbying activities is running well and that the paper filings are no longer necessary. As a result, staff suggests eliminating the third recommendation in the staff memorandum.

Commissioner Downey reminisced that, about four years ago, the Commission experienced a verification problem with online filing. At that time, he mentioned to staff that when people file an online state tax return with the Franchise Tax Board, they are required to sign in front of the computer and maintain as a record that the return that was just filed is accurate under penalty of perjury.

Technical Assistance Division Chief Carla Wardlow said she thought that related to the regulation implementing the form filed for paying for an advertisement that identifies a candidate but does not expressly advocate his or her election. It was part of the new Proposition 34 language, not part of the electronic filing sections in the Political Reform Act (PRA) so it did not have the automatic penalty of perjury presumption attached to it that the other filings have.

Commissioner Downey opined that if he were in the Enforcement Division, he would rather have a slip of paper with a signature on it. That would also require the Commission to decide whether the vendor could sign and maintain the record on behalf of the filer.

Mr. Tocher responded that there was some discussion of this issue during the interested persons meeting, and the general response from the filers was that if the system was paperless, then it should really be paperless. In the federal system, the use of a password is essentially a signature, because it is like a personal identification number (PIN) on an ATM card and is unique to the individual. That is the security of the system. When an online vendor files on behalf of another, then the vendor must input his own PIN as well as the filer's. At any time, a filer can notify the Secretary of State that he would like a new PIN or that a particular vendor is no longer authorized to file on his behalf. Feedback about this system indicated that the federal online filing PIN system works well and that there was no problem with the presumption.

Commissioner Karlan asked under what circumstances the presumption of filing under penalty of perjury would be rebuttable, for example, where the vendor was faithless.

Mr. Tocher replied that he is unaware of any enforcement actions that have arisen out of this subdivision and the presumption in the statute. Staff's second recommendation aims to make the presumption clear to filers and vendors.

Commissioner Karlan added that, in the future, digital signature systems will be developed, so Commission staff should communicate with the Secretary of State's office and pay attention to that development.

Mr. Tocher stated that staff would like to bring the proposed regulation back for adoption in March.

Commissioner Karlan moved to approve the first two recommendations. Commissioner Knox seconded the motion.

Commissioners Downey, Karlan, Knox, and Chairwoman Randolph voted, "Aye." The motion carried by a 4-0 vote.

Item #22. Adoption of Proposed Regulatory Amendments to the "Gift Cluster" Regulations 18941.1, 18946, 18946.1, 18946.2, and 18946.4; and adoption of regulation 18640.

Commission Counsel William J. Lenkeit said he received a comment letter from Assembly Speaker Nunez in opposition to any changes to the face-value rule for tickets under regulation 18946.1

Mr. Lenkeit explained that the proposed amendments to regulations 18946-18946.4 are intended to resolve issues concerning the valuation methods for ticketed events, invitation-only events, and 501(c)(3) fundraising events. Decision point 1 proposes an amendment to establish a ticket's value at the cost to the donor in cases where the ticket was purchased by the donor at a higher price than the face value of the ticket. Decision point 2 proposes options regarding the "drop-in" rule for guests who attend an event for a short period of time. Decision point 3 contains two options regarding 501(c)(3) events, one which eliminates the rule altogether, and another that limits the rule to allow two tickets per attendee. Decision point 4 offers an option to maintain the current valuation rules for both 501(c)(3) organizations and other non-profit organizations but limit the application of the rule to two tickets when the fundraiser provides admission to certain types of events. Any additional tickets over the 2 ticket limit would be valued under the "face value" rule.

Kathy Donovan, from the law firm of Pillsbury Winthrop, spoke in support of staff's recommendation in decision point 4. Although her clients have not been involved in any "Rose Bowl" type events, the decision point achieves the goal of maintaining the public purpose of charitable events and fundraising and the involvement of government officials. On the other hand, it provides a slight cap on the misuse of those tickets. Her firm would rather see this cap than have the rule eliminated altogether.

In response to a question, Mr. Lenkeit commented that the "face-value" rule has been in effect since the adoption of the regulation. He explained that this issue comes up with events such as the Super Bowl, the World Series, NBA play-off games, and King's games, for example.

Chairwoman Randolph noted that there was an e-mail that went around the FPPC offices with an offer to sell two $25 King's tickets for $100. If someone bought those tickets, then took their friend at another state agency who looked at the $25 face value of the ticket and claimed the face value, then the friend would have violated the PRA. Yet, a public official sitting next to the friend would not have violated the PRA if the person who gave the ticket to them paid $25.

Commissioner Knox said that the response to that is that the public official has a duty to make an inquiry.

Chairwoman Randolph hypothesized that a public official may get the ticket and not pay attention to the face value, only to remember in April that he or she went to a game but not the amount of the ticket. If the donor also does not remember, then he would go online to find the cost of the ticket to that game and see that the ticket cost $25.

Commissioner Knox responded that the Commission is considering several regulations that put the public official on notice to make some estimate about the cost of food, beverage, or an event. If the official goes to an event and there are a lot of empty seats, it would probably be a good guess that the donor paid face value for it. If the official is sitting in the front row at a LA Laker's game, it is probably a good guess that the official should make an inquiry about the price the donor paid. He did not think it was too much of an imposition on the official to have them ask about the price of a ticket they receive.

Commissioner Downey agreed with Commissioner Knox, stating that once a person becomes a public official, the word "gift" is a trigger, so that the official should question the amount of anything received, even when they think they know the answer. If they do not inquire, then they would be at risk.

Chairwoman Randolph commented that she was not convinced that there was a problem that needs to be solved by imposing another duty on people who do not intuitively know that they should be adding another question to their inquiry. If the Commissioners decided to change the rule, she offered proposed language that would reverse the rule to say that the value is the cost the donor paid, unless the donor paid less than face value, rather than say that the value is the face value. She opined that people would not care if the donor paid nothing. This way, the first thing one would see in the manual or the regulation would be the value the donor paid, not the face value. She claimed that this is the same rule in substance, just stated in a different way.

Commissioner Karlan added that the only reason that the Commission is concerned with the amount the donor paid is because it gives people a sense of the value to the public official recipient. The point is to determine the internal value of the gift to the public official, and how beholden the official feels to the donor as a result. But, the market value and the cost to the donor are easier to determine than the subjective value to the official, so that is why those numbers are used. Thus, telling an official that they have some obligation to figure out the cost of the event would not be a terrible thing to do.

Chairwoman Randolph said that she disagreed with Commissioner Karlan and that she would vote no on that aspect. But, if the Commission imposed that duty, then that duty must be clear,

and the Commission would need to say that the official's first inquiry is the cost that the donor paid. The public official should be made aware at the outset that they should be concerned with the amount the donor paid for the ticket, and not necessarily the face value.

Commissioner Knox added that he did not think the official should ever claim below the face value on a ticket, because that is a market price. But, it would be fair for an official to be on notice to ask whether the donor paid more than the face value. Usually, the circumstances justifying that inquiry will be apparent.

Chairwoman Randolph clarified that the "face value" is the default, that she did not intend for the official to claim the value at lower than face value. The language read, "a pass or ticket that provides one-time admission or access… shall be valued at the price the donor purchased the ticket, unless the ticket was obtained by the donor for less than face value, in which case, the value should be the face value of the ticket."

Commissioner Karlan commented that Chairwoman Randolph's language seems more confusing to the official.

Chairwoman Randolph replied that it reflects the goal of the Commission, which is that the first level of inquiry should be the cost to the donor.

Ms. Donovan commented that there have been situations where corporations, for example, purchased suites and advertising rights, and received tickets as a package deal. Thus, the price of each ticket is not itemized and it may be difficult to determine. In the past, her firm has looked at the availability of the ticket to the public and the per-ticket value to determine the cost to the donor. For ARCO Arena, that comes out to the face value of the tickets plus the value of any food and refreshments that the official received while there. This relates to the suggestion that the value must be what the donor paid.

Mr. Lenkeit explained that if the donor is paying for advertising rights, that would not be included in the price of the ticket.

Commissioner Karlan added that in stadiums that have seat licenses in addition to the price of the ticket, so that in order to buy the ticket, the buyer must own the underlying seat license. Thus, the ticket price might say $50, but no one could actually buy a ticket for $50 if the cost of the seat license was amortized over the entire season. This would also occur in luxury boxes, where there is a cost to own the box, and there is a per-ticket charge for each individual ticket.

Chairwoman Randolph commented that there is some arbitrariness to the system to use a face value method, because it may not speak to the value that the recipient places on the ticket, and it may not be the real cost to the donor. But, the goal is to approximate the fair market value of what the recipient received, and this is likely the face value.

Commissioner Karlan responded that what the public really wants to know is how beholden the official feels to the donor. All of this debate is to determine at what point does the official have to report the gift, because the public will base its judgment on its own notion of how much the

gift is worth. The problem arises when the official does not report the gift; those items reported will be evaluated by the public.

Chairwoman Randolph said there must be a point at which a value must be set. She commented that at the last meeting, the Commission decided not to use any secondary-market value, but to some degree, that flies in the face of reality. The Commission should focus on the most common situation, and most commonly, the ticket's face value is the cost of the ticket.

Commissioner Knox added that that is why he thought the staff's proposal was the most useful method because it starts with a "face value" analysis and then puts the official under some obligation to discover if there was a higher value than the face value.

Commissioner Karlan suggested softening the rule in decision point one to add that the recipient either "knows or should have reason to know" that they have a duty of inquiry. While this may make the rule less clear, it may help solve the problem of the duty of inquiry. This may put more burden on enforcement to have to determine if the official had reason to know; but it would solve the issue of sold out events with an unusually high fair market value. The issue is whether the donor paid more than the face value.

Enforcement Chief Steven Russo opined that it would place too much of a burden on the Enforcement division to be required to figure out whether tickets were scalped at the event or whether there were other circumstances because often the investigation does not take place until a year or more after the event. In looking to whether the donor may have paid more than the face value, Enforcement looks at common sense aspects. For example, luxury box seats were claimed at face value, but Enforcement staff knew that this was not the proper method for valuation of this very sought-after ticket that could not be found at that price. Thus, Enforcement looked at what the donor paid for the ticket, not the face value or the scalped value. It was established that the donor had paid more than face value for the ticket, given the ticket price, the license fee, and the luxury box cost. Enforcement staff was able to make this determination because staff did not have any regulation like the one that was being considered at the meeting. He opined that the ticket did not have a face value.

Commissioner Karlan suggested that what Mr. Russo said supports decision point 1, because the burden on Enforcement to show that the value of something is more than face value is a sufficient brake on the likelihood of there being much enforcement in situations where it should not be obvious to any reasonably well-informed person that they received a very valuable gift.

Mr. Russo opined that Commissioner Karlan's suggestion would make it harder for Enforcement to enforce because then staff would need to establish the circumstances to show the information that the official had in that situation. It is more reasonable for Enforcement to establish that the official has an inquiry duty under any circumstance and then look at the cost to the donor. The issue is not whether there is a difference of $10; instead, the issue is whether there is a substantial difference between the actual value and the claimed value, and whether it arises to the level of being a gift-limit violation or creating a conflict of interest.

Commissioner Knox added that any time an official receives a gift, he ought to be asking about its cost. He commented that it is not such a great burden to impose on them.

Commissioner Karlan explained that Enforcement has some discretion, and that the purpose is not to prosecute an official for not claiming an additional $4.95 that was added for processing a ticket. The likelihood of enforcement in cases where the value of a gift is not really high seems minimal or non existent.

Scott Hallabrin, with the Assembly Ethics Committee, said he is concerned that the FPPC wants to get at the expensive tickets. He advises approximately 1,000 Assembly employees, who likely are not going to get the expensive tickets. Almost all of these tickets require a service fee, so people generally pay more than face value. So, a regulation like this may impact many more people than intended.

Commissioner Karlan wondered if there was a way to deal with the Commission's concern but allow people to disregard service fees, postage and handling, etc, and that a personal license fee is not considered a service fee. For example, an exception could include any service or handling fee imposed by the issuer of the ticket. No one could say with a straight face that a $50,000 seat license fee is a service or handling fee. A broker's markup would likely not be included in the exception. The purpose is to deal with cases where there is a gross disproportion between the amount that the donor paid and the face value because the public is otherwise misled. The question is how to do that so that the regulation is clear and fair.

Chairwoman Randolph explained that in advising employees in how to follow the law, one would not tell the recipient that he is supposed to inquire with the donor on the cost paid but that since the ticket is not that valuable, that he can simply list the face value.

Commissioner Karlan suggested that the concern was not about social events with a friend where it would be odd to ask someone how much they paid for the event. Instead, the events of concern are those which are not social but motivated by interests. The problem is that the gift rules do not distinguish between the two. Theater tickets have high mark-ups as do concert tickets.

Commissioner Downey said that Assembly Speaker Nunez is right. The Commission is trying to determine good ways to advise the public and facilitate the operation of the PRA on the part of the regulated public. The vast majority of filers are going to receive non-interesting gifts. If someone gets a Super Bowl ticket for $150 and claims that on the form even though it would have cost them over $500, then the public still has the information that it needs. But, the concern is about the official who gets more value than what was reported. He suggested simplicity through a rule that would catch most of the gifts at the face value, ignoring vendor and service fees.

Chairwoman Randolph suggested moving to the other decision points and return to this issue at the end. Her preference was to leave the rule as it is, but tailor it rather than put the onus on the official to inquire with the donor.

Regarding decision point 2, Chairwoman Randolph suggested going with the "brief period of time" language.

Commissioner Downey suggested "a brief time" rather than "period of."

Commissioner Knox favored specifying an amount of time, for example, 60 minutes, to make it clear to the official.

In response to a question, Mr. Hallabrin said he has no position from the Assembly Speaker on that issue.

Mr. Russo added that "a brief period" would be fine. He was concerned that an official would otherwise have to be timed with a stopwatch to determine how long the official was at an event. In giving advice, it would be helpful to have a period of time, but staff would never know exactly how long the official was at a gathering. Therefore, "a brief period" would be sufficient.

Commissioner Knox replied that he would also be okay with "brief."

Regarding the second portion of decision point 2, Chairwoman Randolph suggested the Commission follow the rule in the Commission's advice letters which requires officials to report the value of food and beverage that was consumed. This would codify the Commission's exiting advice.

Mr. Hallabrin commented that he understands the current advice as saying that there is no quantification of time but merely whether the official consumes anything or stays for the entertainment. While Speaker Nunez has no position on this at the moment, Mr. Hallabrin recommended eliminating any temporal element and keeping the status quo. His preference would be to eliminate "a brief time" and say "receives only minimal appetizers and drinks" and "the value of the gift is the cost of the food and beverage…" which would be consistent with the current rule, as he understands it.

Chairwoman Randolph suggested that alternative 2 would say, "does not stay for any meal or entertainment if otherwise provided and receives only minimal appetizers and drinks. The language "a brief period of time" would be deleted from the proposal.

Commissioner Karlan clarified that line 9 of the proposal would also need to be changed slightly and that the suggestion would eliminate alternative 1 and alternative 2 and change the language after them in either option 1 or option 2.

Mr. Lenkeit said the language would eliminate "and attends for…" and replace it with "and does not stay for any meal or entertainment and receives only minimal appetizers and drinks."

Chairwoman Randolph agreed that that suggestion would be fine. She then moved to decision points 3 and 4, which were alternatives of the same issue. She said that she is not convinced that this issue is a problem, but if anything is done, she would prefer the two-ticket rule.

Commissioner Downey explained that this issue is a balancing of interests to allow the charitable organization to bring in officials in order to promote their cause.

Commissioner Karlan replied that one way of balancing things is to restrict the "no value" rule to two tickets, but in return the official cannot receive any additional tickets. This way, the official can go with their spouse or partner and does not have to report the ticket. If the official wants more tickets, then they would have to pay for them. Thus, the ability of the official to take any additional free tickets would be sacrificed in return for the Commission not adding any burden on the official to report the value of the two tickets.

Mr. Lenkeit clarified that the extra tickets would then be considered under subdivision (a), which requires the value of the ticket to be determined by their face value less the amount stated as the donation price on the ticket or if no face value…

General Counsel Luisa Menchaca added that under decision point 4, when the event is a sporting event, the regulation cites not subdivision (a) but the regulation that was discussed earlier, so it is a separate decision point, not just another option.

Commissioner Karlan explained that, as she understood decision point 4, an official who got two tickets to the Rose Bowl parade, for example, could accept two tickets, but no more, unless they paid for those additional tickets.

Chairwoman Randolph stated that she likes the concept but is concerned that it leads to another analysis of determining how much the official should pay for the additional tickets.

Commissioner Karlan said she did not think that question would arise, because if it is a ticket available to the public, then the official would pay the face value. There would be no gift because the official would buy the additional tickets were bought on the market. If the official pays for the ticket, then there is no relationship to the donor.

Chairwoman Randolph questioned whether the additional tickets in that situation would also still be available to the public, or whether the person who sells the official the additional tickets would be giving the gift of the opportunity to buy the ticket at a reduced market value.

Mr. Russo said that the answer would depend on who is selling the official the ticket. If buying from a third party, then there may be a gift issue.

Chairwoman Randolph said that her concern is about the opportunity to purchase tickets as a gift issue, because the option to buy the additional tickets may in and of itself, be considered a gift, particularly in Super Bowl situations.

Mr. Russo added that generally, when there is a willing buyer and seller, the ticket price will be presumed at the fair-market value. That would become a factual question.

Commissioner Karlan commented that the reason the official is allowed to receive tickets to an event that is sponsored by a non-profit organization is to help the non-profit raise money. She

does not see why it is necessary to allow the official to bring several friends. But, it seems fair to allow them to bring a friend so they do not have to attend alone. Another proposal could be to allow two free tickets, but if more than two tickets are accepted, then all the tickets must then be valued and reported.

Mr. Hallabrin commented that he likes Commissioner Karlan's concept because it is clean, but he expressed concern about imposing a violation on an official for accepting more than two tickets.

Commissioner Karlan clarified that it would not be a violation, just something the official would have to value and report the additional tickets. If only taking two tickets, then the official would simply not need to value or report them.

Ms. Menchaca suggested that the words, "additional" could be stricken because then all the tickets would be valued pursuant to the regular valuation rules.

Chairwoman Randolph said she likes Commissioner Karlan's suggestion but would like to bring the entire agenda item back. She advised staff to draft language as discussed on regulation 18946.1, and bring back staff's proposal and Commissioner Karlan's proposal on regulation 18946.4.

Mr. Lenkeit pointed out that on regulation 18946.4, under option 2, the additional tickets would be valued in the same way as any non-profit event. Under decision point 4, the additional tickets would be valued under the face value rule, however adopted, for all non-profits, both 501(c)(3) organizations and remaining non-profits.

Chairwoman Randolph responded that staff should bring all of the options back. Regarding regulation 18946.1(a), she directed staff to bring back the option of doing nothing, the option that was discussed, and an additional proposal that tailors the language to find a way to exclude the mere service fees and distinguish them from a broker's markup and also to deal with gross differences between the face value and the cost to the donor. She offered as suggestions for the latter option to base the rule on a percentage over the face value or use a standard of "knows or has reason to know."

Ms. Menchaca added that staff should look at the issue of repeat donors and also limits on the amount of tickets over time.

The Commission took a 7 minute break and returned at 12:45 p.m.

Item #23. Legislative Proposals for 2005.

Executive Director Mark Krausse explained that staff seeks ratification of an amendment to the Government Code section 1090 proposal to delete the words "or criminal" in the description of what effect the Commission's advice would have. Thus, the Commission's advice would not be

"evidence of good faith effect" in a criminal action. This is an amendment staff offered to help alleviate the concerns of the District Attorney's Association. The next item related to a new proposal to delay the filing of late reports until the next business day when the due date falls on a weekend. For the 24 and 48 hour reports, it expressly does not do this, so the item relates only to paper reports and others. This proposal would likely be included in an omnibus reform bill authored by one of the elections committees.

AB 16

Executive Fellow Theis Finlev explained that AB 16 (Huff) is a prohibition on contributions to the Governor or Legislators from the date of the May Budget Revision to the date of enactment of the Budget Bill, which, in theory, is on July 1. Lately, this budget deadline has been missed by two months; thus, the prohibition would extend beyond the date of the July 1 deadline. There is a potential for a court challenge based on First Amendment problems or on the fact that new candidates would not be covered by the legislation and would therefore have an unfair advantage over incumbents who would be subject to the provisions. Staff recommends a position of "oppose unless amended" to reflect language providing that any attorney's fees would be paid from the State General Fund and not the Commission's budget. In response to a question, Mr. Finlev said the recommended position is based on the attorney's fees issue.

Mr. Krausse added that, although staff tries to avoid raising those kinds of issues so as not to encourage legal challenges, they will raise the constitutional concerns with the author's office in this case. A similar bill introduced last year died in its first committee without a hearing.

Mr. Finlev commented that last year, the bill had a provision providing an exception allowing a candidate to receive contributions prior to an election, but this year the bill has no such provision.

AB 40

Mr. Finlev explained that this bill combines two bills from last year's legislative session. AB 40 (Wolk and Frommer) would prohibit lobbyists who contract with legislators or constitutional officers from lobbying or contacting those same members or officers. This arose from a situation where a lobbyist was also a campaign consultant and threatened legislators with campaign opposition if they did not vote for bills supported by his clients. Last year, both bills died in the Senate. Staff recommends adoption of a position of "oppose unless amended" to include a provision requiring that fees resulting from a successful legal challenge be paid by the General fund.

Mr. Krausse stated that the clause in the staff recommendation relating to contingent fees is actually not an issue this year. It has been the practice of some campaign consultants to make deals with their candidates so that their fees will not be payable until the candidate wins, and therefore it would not have to be reported on pre-election reports. The effect is that it would not be shown in the expenditures, so if they have accepted expenditure ceilings, that amount should be reflected and be docked from their limits. That is part of what this bill would do.

SB 8

Commission Assistant Whitney Barazoto explained that SB 8 (Soto) would extend to local officials the "one-year" ban that currently applies to state elected officials and air pollution control district officials. The ban is also known as the "revolving door" ban. It restricts these officials, for one year after leaving office, from representing for compensation another person before the governing body of which he or she was previously a member. SB 8 includes the same language that was in SB 1351 from the 2003-04 Legislative Session, with minor changes. SB 1351 died in the Assembly Appropriations Committee last year. SB 8 would increase the workload of Commission staff by an estimated $168,000 annually for which there is currently no reimbursement to the Commission in the bill. Staff recommends the Commission adopt a position of "oppose unless amended" to include the annual funding of $168,000.

Chairwoman Randolph added that the scope of officials covered by SB 8 has been tailored from last year's SB 1351.

SB 11

Mr. Finlev explained that SB 11 says a candidate for elective state office or local office shall not accept any contributions from a manufacturer or vendor of voting equipment or systems. However, it is not tailored enough to match its purpose. For example, it would presumably prohibit California businessmen who sell voting equipment in the Philippines from making contributions to California candidates. It is broad and will likely be amended. Staff recommends the Commission adopt a position of "oppose unless amended" to include a provision that any fees resulting from a successful legal challenge not be paid from the Commission's budget but from the General Fund.

SB 36

Mr. Krausse said SB 36 was introduced by Senator Florez as a result of a situation in his district. There, a non-profit organization formed as a 501c(4) ran ads against Senator Florez, not during his election, but two years prior to his election. The ads had no "magic words" or even any call for action other than for the public to call the Senator to let him know their general positions on issues. The purpose of the bill is to require disclosure of issue ads to make clear the source of the contributions for the ads. The approach in the bill is problematic for a number of reasons. First, the bill focuses on non-profit organizations; thus staff recommends suggesting to the author that the bill be broadened to include anyone doing the type of advertising they are concerned with. Second, instead of the $1,000 threshold that is currently in the bill, staff recommends that the author identify the type of communication, such as radio or television broadcast or cable. For example, federal law defines electioneering communication as broadcast, satellite, and other specified communications to 50,000 or more constituents in the candidate's district. Staff recommends a similar approach to limit the bill's application without setting a dollar figure. The author is also considering a higher dollar figure. The author's office is open to amendments, but is not likely to take an amendment with a time delimiter, such as a certain number of days before an election.

Commissioner Karlan said the Commission certainly should not be responsible for paying attorney's fees for the defense of this bill.

Commissioner Downey moved to adopt staff's recommendations on AB 16, AB 40, SB 8, SB 11, and SB 36.

Commissioner Karlan seconded the motion.

Commissioners Downey, Karlan, Knox, and Chairwoman Randolph voted, "Aye." The motion carried by a 4-0 vote.

Item #24. Executive Director's Report.

Executive Director Mr. Krausse added that two new attorneys have been hired in the Legal Division: Andy Rockas, who has over 10 years in civil practice, and Emelyn Rodriguez, a former journalist who just finished law school and passed the BAR exam. Both will start on February 7.

Item #25. Litigation Report.

Commission Counsel Luisa Menchaca had nothing to add.

The meeting temporarily adjourned to Special Session (see Special Session minutes) at 12:00 p.m.

Special Session adjourned at 12:07 p.m.

Commissioners went into closed session at 12:07 p.m.

The meeting adjourned at 1:22 p.m.

Dated: January 21, 2005

Respectfully submitted,

_____
Whitney Barazoto
Commission Assistant

Approved by:

_____
Chair Randolph